IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS and CHRISTINE BOWSER, Plaintiffs, v. PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, Defendants.	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO STAY, DEFER, OR ABSTAIN**

Defendants Patrick McCrory, North Carolina State Board of Elections, and Joshua Howard (collectively "Defendants") submit this Memorandum of Law in support of their Renewed Motion to Stay, Defer, or Abstain from further proceedings in this action because parallel litigation involving the same claims and issues raised in this action is currently pending before the North Carolina Supreme Court on remand from the Supreme Court of the United States. In support of their motion, Defendants show the Court as follows:

STATEMENT OF FACTS

I. Summary of the pending state court proceedings regarding the First and Twelfth Congressional Districts

On July 27-28, 2011 the North Carolina General Assembly ("General Assembly") enacted three new redistricting plans for the North Carolina House of Representatives

("State House"), North Carolina Senate ("State Senate"), and the United States House of Representatives ("Congress"). *See* S.L. 2011-404 (State House); S.L. 2011-402 (State Senate); and S.L. 2011-403 (Congress); (D.E. 30-1, p. 6) (Judgment and Memorandum Decision of Three-Judge State Court in *Dickson et al* v. *Rucho et al*, Nos 11 CVS 16896 and 11 CVS 16940 [Wake County Superior Court July 8, 2013] filed as Ex. A to Def's App. in Opp. to Pls' Motion for a Preliminary Injunction). On November 1, 2011, all three redistricting plans were precleared by the United States Department of Justice under Section 5 of the Voting Rights Act ("VRA"), 42 USC § 1973c. (D.E. 30-1, pp. 6-7.)

Two separate groups of plaintiffs filed lawsuits on November 3 and 4, 2011 challenging the constitutionality of specific districts in all three plans, including the First Congressional District ("First District") and the Twelfth Congressional District ("Twelfth District") (D.E. 30-1, p. 7.) One set of plaintiffs (referred to collectively as the "NAACP Plaintiffs") included the North Carolina State Conference of Branches of the NAACP ("NC NAACP"), the League of Women Voters of North Carolina ("LWV NC"), Democracy North Carolina ("Democracy NC"), the A. Philip Randolph Institute ("Randolph Institute") and forty six individual plaintiffs. (D.E. 44-1 & 44-2, ¶¶ 9- 57). The other set of plaintiffs (referred to collectively as the "Dickson Plaintiffs") included 56 individual plaintiffs. (D.E. 44-3 & 44-4, ¶¶ 11-56). Like the Plaintiffs here, the Dickson Plaintiffs are represented by Edwin Speas, Jr., John O'Hale, and Caroline Mackey of Poyner Spruill, LLP. The three-judge state court consolidated the cases on December 19, 2011. (D.E. 30-1, p. 7.) The consolidated cases are hereinafter referred to collectively as "*Dickson.*"

In challenging the 2011 First and Twelfth Districts, both groups of plaintiffs in *Dickson* alleged that: (1) race was the predominant factor used by the General Assembly to draw both of these districts, (2) neither district was sufficiently compact, and (3) neither district was narrowly tailored to comply with either Section 5 or Section 2 of the VRA. (D.E. 44-1 & 44-2, ¶¶ 1-3, 384-98); (D.E. 44-3 & 44-4, ¶¶ 78-81, 377-83, 396-401). In addition, both sets of plaintiffs in *Dickson* asked the state court to declare the First and Twelfth Districts unconstitutional under the Fourteenth Amendment of the United States Constitution. (D.E. 44-1 & 44-2, ¶¶ 480-86); (D.E. 44-3 & 44-4, ¶¶ 515-19). The NAACP Plaintiffs also alleged that, as a result of the districts, "the individual and organizational plaintiffs suffer representational harms, impediments to their mission, activities and interests, a diminution in their ability to participate equally in the political process and inherent harm to their dignity by racial discrimination and denial of equal protection." (D.E. 44-1 & 44-2, ¶ 486).

On July 8, 2013, following a trial on whether the First Congressional District satisfied the strict scrutiny standard of review under the Fourteenth Amendment in *Dickson*, the three-judge panel unanimously ruled that the General Assembly had a strong basis in evidence for enacting the First District, and that the district was narrowly tailored. Based upon these factual findings, the three-judge court dismissed plaintiffs' challenge to the First District. (D.E. 30-1.) Also, based upon evidence presented at trial, the three-judge panel unanimously entered judgment in the favor of the defendants in *Dickson* on the plaintiffs' claims that the Twelfth District violated the Fourteenth Amendment. (*Id.*) Both sets of plaintiffs in *Dickson* appealed the ruling of the state

three-judge court to the North Carolina Supreme Court. The North Carolina Supreme Court heard oral arguments on the appeal on January 6, 2014. On December 19, 2014, the North Carolina Supreme Court issued an opinion affirming the unanimous judgment of the three-judge panel in favor of the defendants in *Dickson.*

On January 16, 2015, the plaintiffs in *Dickson* filed a petition for writ of *certiorari* with the United States Supreme Court that was granted on April 20, 2015. In granting plaintiffs' petition for writ of *certiorari,* the United States Supreme Court vacated the North Carolina Supreme Court's judgment, and remanded *Dickson* to the North Carolina Supreme Court for further consideration in light of the decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. __ (2015) which was handed down on March 25, 2015, three months after the North Carolina Supreme Court's ruling.

In remanding *Dickson* to the North Carolina Supreme Court, the United States Supreme Court expressed no opinion regarding whether the North Carolina Supreme Court's ruling was correct in light of its *Alabama* decision or whether any of the districts challenged by the plaintiffs in *Dickson* were unconstitutional. *Alabama* involved an appeal from a decision by a three-judge federal district court dismissing a challenge to legislative districts enacted by the State of Alabama. *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013). The United States Supreme Court vacated the decision by that three-judge court and remanded the case for further proceedings consistent with its opinion. The United States Supreme Court did not declare any of the Alabama districts illegal or unconstitutional. The United States Supreme Court's holding in *Alabama* does not conflict in any respect with the North Carolina

Supreme Court's prior ruling in *Dickson*. (*See* Defendants' Brief on Remand filed in *Dickson* at pp. 3-4) (attached as D.E. 106-1). As a result, the defendants in *Dickson* have urged the North Carolina Supreme Court to once again reject the claims of the plaintiffs in *Dickson* and to affirm the constitutionality of the challenged districts.[1]

II. Plaintiffs' allegations and claims in this action regarding the First and Twelfth Districts are identical to those of the plaintiffs in *Dickson*

As stated in Defendants' previous Motion, the Plaintiffs in this action, like the plaintiffs in *Dickson*, allege that they have brought "this action to challenge the constitutionality of North Carolina Congressional Districts 1 and 12 in violation of the Equal Protection Clause of the Fourteenth Amendment." (D.E. 1, Compl. ¶ 1.) Plaintiffs contend that the First and Twelfth Districts were "drawn with race as their predominant purpose" and that the legislative leaders "indicated that race was the predominant motivating factor." (*Id*. at ¶¶ 5, 38, 54, 63-66.) Plaintiffs further allege that the General Assembly "subordinated other redistricting principles" in drawing the First District and allege that both First and Twelfth Districts are "bizarre" or "not compact." (*Id*. at ¶¶ 37, 51, 52, 61, 62.) Finally, the Plaintiffs allege here that neither district was reasonably necessary to obtain preclearance of the plans under Section 5 of the VRA or to protect the state from liability under Section 2 of the VRA. (*Id*. at ¶¶ 3, 5, 58, 59, 66, 67, 71, 72.) In

[1] In similar cases, lower courts have reaffirmed their prior position following a remand from the United States Supreme Court and the Supreme Court has declined to further review the case. *See, e.g., Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F. 3d 289 (6th Cir. 1997), *cert. denied* 525 U.S. 943 (1998).

short, the claims of the Plaintiffs in this action are identical to the claims made by the plaintiffs in *Dickson*.

QUESTION PRESENTED

Should this Court should stay or defer further proceedings in this action pending resolution of the identical state court claims brought by the plaintiffs in the *Dickson v. Rucho*?

ARGUMENT

A. Federal courts must defer to state courts and state legislatures in disputes over redistricting

The primacy of state judiciaries in redistricting disputes has been repeatedly recognized by the United States Supreme Court. *See Scott v. Germano*, 381 U.S. 407 (1965); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Growe v. Emison*, 507 U.S. 25, 34 (1993). In *Germano*, the Court observed that "the power of the judiciary of a state to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the states in such cases has been specifically encouraged." 381 U.S. at 409; *see also Chapman*, 420 U.S. at 27 ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.") Moreover, the Court has held that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34. Although "i[n] other contexts, a federal court's decision to

decline to exercise jurisdiction is disfavored and thus exceptional . . . in the reapportionment context, when parallel State proceedings exist, the decision to refrain from hearing the litigant's claims should be the routine course." *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997) (citations omitted).

B. This Court should stay or defer proceedings in this matter pending resolution of the identical state court claims brought by the plaintiffs in *Dickson*

1. Applicable Legal Standard: The Supreme Court's decisions in *Germano* and *Growe*

In *Germano*, the United States Supreme Court considered a challenge brought in an Illinois federal district court to an Illinois State Senate redistricting plan. 381 U.S. at 408. While the plan was the subject of litigation in the state courts, a federal district court entered an order declaring the plan invalid and requiring that "any implementation, amendment or substitution of all or part of the said defective portions" of the legislation be submitted to the federal court for approval before the next election. *Id.* Thereafter, the Illinois Supreme Court issued a decision finding the plan invalid. *Id.*

Following the Illinois Supreme Court's decision, the *Germano* appellants moved the federal district court to reconsider its decision, vacate its order, and stay further proceedings but the federal court refused. *Id.* at 408-09. On appeal, the United States Supreme Court held that the federal district court erred by failing to stay its proceedings after the Illinois Supreme Court issued its ruling invalidating the reapportionment plan. *Id.* at 409-10. The *Germano* court held that the district court instead "should have stayed its hand" and remanded the case with directions to the district court to "enter an order

fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate." *Id.*

The United States Supreme Court reaffirmed the principles outlined in *Germano* nearly 30 years later in *Growe v. Emison*. *Growe* involved three separate groups of plaintiffs: The first group filed an action in Minnesota state court challenging the state's congressional and legislative districts. 507 U.S. at 27. A second group of plaintiffs then filed an action in federal court raising similar challenges to the congressional and legislative districts, but also objecting to the districts under Section 2 of the VRA. *Id.* at 28. The third group of plaintiffs then filed their own lawsuit in federal court raising federal and state constitutional challenges to the new legislative districts. *Id.* at 28-29. No claims under the VRA were included in the lawsuit filed by the third group of plaintiffs. *Id.*

The two federal cases were consolidated but the state court case continued separately from the consolidated federal case. *Id.* at 29. The Minnesota state court ultimately sought to enter an order approving a redistricting plan for the state. *Id.* at 30. But before the state court could do so, the federal court had adopted its own redistricting plans and entered a permanent injunction prohibiting the state court from interfering with implementation of the redistricting plans drawn by the federal court. *Id.* at 30-31. On appeal, the United States Supreme Court ruled that the district court erred in not deferring to the Minnesota state court as required by *Germano.* *Id.* at 34. The *Growe* Court noted that, in "the reapportionment context," federal judges are "required . . . to defer consideration of disputes involving redistricting where the State, through its legislative *or*

judicial branch, has begun to address that highly political task itself." *Id.* at 33 (emphasis in original).

The *Growe* Court also rejected the argument that differences between the state and federal cases supported a departure from *Germano* principles. *Id.* at 34-35. The Court found that *Germano* did not require the federal and state court complaints to be identical before the federal court was required to defer to the state court because "the primacy of the State" in the redistricting context "compels a federal court to defer." *Id.* at 35-36 (stating that "the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C § 1738" required the federal court to defer to the state court).

2. *Germano* and *Growe* continue to require this Court to stay all proceedings in this action pending final disposition of the identical claims raised by the same lawyers in *Dickson*

The requirements of *Germano* and *Growe* are clear: where a state court has "begun to address" a redistricting dispute, a federal court should "stay its hand" and defer consideration of any parallel redistricting challenge filed in federal court. This argument applies with even greater force in this case where the same lawyers elected to first pursue relief in state court and only sought relief in federal court after losing in state court. Because the same claims raised by Plaintiffs in this action have already been addressed in *Dickson* by a three-judge state court panel and are currently pending on remand before the North Carolina Supreme Court, this Court should stay or defer further proceedings in this matter until *Dickson* is been fully resolved.

The grounds for abstention, or deferral, in this matter until *Dickson* is fully resolved, are even stronger than those in *Growe* because the Plaintiffs' counsel and Plaintiffs here have raised the same claims with respect to the First and Twelfth Districts as those currently before the North Carolina Supreme Court on remand. After the North Carolina Supreme Court issues its decision, any aggrieved party in *Dickson* will again have the right to appeal to the United States Supreme Court. Should this occur, and if the United States Supreme Court decides to hear the case, its decision would be binding on this Court. Thus, piecemeal litigation could result if this Court moves forward with a trial in this matter before *Dickson* is resolved.

3. The doctrines of *Res Judicata* and *Collateral Estoppel* likewise require this Court to stay all proceedings in this action pending final disposition of the identical claims raised in *Dickson*

When the Court hears testimony in this case, it will understand that the Plaintiffs' lawyers are directing this litigation, not Plaintiffs, who were recruited to serve as nominal Plaintiffs. In any case, even if neither party appealed the North Carolina Supreme Court's forthcoming ruling, or if the United States Supreme Court declines to hear any appeal by one of the parties in *Dickson*, the Plaintiffs in this action will be bound by the judgment in *Dickson* under the doctrines of *res judicata* (claim preclusion) or collateral estoppel (issue preclusion). In addition to the fact that Plaintiffs' claims in this action involve the same claims and issues with respect to the First and Twelfth Districts which are now before the North Carolina Supreme Court, the interests of the plaintiffs in this litigation align with, and are represented by, the plaintiffs in *Dickson*. Specifically, Plaintiffs Harris and Bowser are members of the NAACP which is one of the

organizational plaintiffs in the *Dickson*.[2] (D.E. 71-1, pp. 3-7). Both Plaintiffs admitted in their depositions that they were members of either a local branch or the national NAACP. (Bowser Dep. 45-48) (cited pages filed at D.E. 104-1); (Harris Dep. 45-50) (cited pages filed as D.E. 104-2). The president of the North Carolina Conference of the NAACP, Rev. Dr. William Barber II, confirmed at his deposition that any individual who was a member of a local branch or the national NAACP was also a member of the NC NAACP. (Barber Dep. 17, 25-27) (cited pages filed at D.E. 104-3). Rev. Dr. Barber's testimony in this regard was consistent with the NC NAACP's complaint in *Dickson* which included the following allegation: "Plaintiff the North Carolina State Conferences of Branches of the NAACP is a non-partisan, nonprofit organization composed of over 100 branches and 20,000 individual members throughout the state of North Carolina." (D.E. 44-1, p. 5) (NC NAACP Compl. ¶ 9). Thus, both plaintiffs are members of at least one organization that represents them and are bound by the state court judgment.

In *Dickson*, all of the organizational plaintiffs, including the NC NAACP and Democracy North Carolina, repeatedly asserted that they had standing to serve as plaintiffs in those cases because they were acting as representatives of their respective members. (D.E. 44-5, p. 17) (citing *Warth v. Seldin,* 422 U.S. 490, 511 (1975) (noting that an "association may be an appropriate representative of its members")). Thus, this Court should abstain, or defer, as the claims of Plaintiffs Harris and Bowser are precluded by the opinion of the three-judge panel in *Dickson* which is binding even while the appeal

[2] In addition, Ms. Bowser admitted that she was also a member of Democracy North Carolina, another of the organizational plaintiffs in *Dickson*. (Bowser Dep. 51) (cited page filed at D.E. 104-1).

of the plaintiffs in *Dickson* is pending. *See Deering Milliken, Inc. v. Fed. Trade Comm'n*, 647 F.2d 1124, 1129 n. 11 (D.C. Cir. 1978) ("it is…clear that the vitality of [a lower court] judgment is undiminished by the pendency of [an] appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative")(alterations added); *SSIH Equip. S.A. v. ITC*, 718 F.2d 365, 370 (Fed Cir. 1983)("the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding"). *See also In re Genesys Data Technologies, Inc.*, 204 F.3d 124, 129 (4th Cir. 2000) ("[I]n a host of cases, the Supreme Court . . . has directed that the full faith and credit statute requires a federal court to apply state res judicata law in determining the preclusive effect of a state court judgment"); *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) ("a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them"); *see also Ashton v. City of Concord*, 337 F. Supp. 2d 735, 741 (M.D.N.C. 2004) ("Under North Carolina law, a previous judgment will preclude a subsequent action if the first decision was a final judgment on the merits, involving the same parties or parties in privity with them, and the same cause of action."); *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004) (With regard to collateral estoppel, "courts will look beyond the nominal party whose name appears on the record as plaintiff [in determining whether privity between parties exist] and consider the legal questions raised as they may affect the real party or parties in interest").

Because the redistricting issues Plaintiffs seek to address in this action have already been reviewed once by a three-judge North Carolina state court and are again being considered by the North Carolina Supreme Court, Plaintiffs cannot show that the North Carolina state courts have refused to address the issues raised in their Complaint. Plaintiffs should not be permitted to take a "second bite" at the same claims made by their lawyers and on behalf of members of the organizational plaintiffs in *Dickson* who argued that they were representing the interests of individual members like the Plaintiffs in this action. Deferral is further warranted in light of the possibility that the United States Supreme Court may render a decision that is binding on this Court on one or more of the claims or issues in this litigation.

C. The record subsequent to this Court's denial of Defendants' Motion to Stay, Defer, or Abstain addresses this Court's previous concerns and supports Defendants' Renewed Motion.

In their May 22, 2014 Order denying Defendants' Motion to Stay, Defer, or Abstain, this Court acknowledged that "stays or deferrals of federal litigation are often appropriate when the state…is contemporaneously engaged in the process of redrawing its congressional map." (Doc. 65, p. 9). However, this Court declined to decide whether *Dickson* required a deferral of the instant plaintiffs' federal case under *Growe* and *Rice.* In their Memorandum in Opposition to Defendants' Motion to Stay, Defer, or Abstain, plaintiffs' opposed abstention or deferral because the North Carolina Supreme Court "had taken no action to put the state on a lawful course and ha[d] shown no signs of urgency in deciding the appeal from the state court's deeply flawed application…" (Doc. 47, pp. 3, 8). This Court ultimately stated that it was "not convinced the North Carolina Supreme

Court [would] issue a decision in the state litigation in a timely manner." (Doc. 65, p. 9) (*citing Growe*, 507 U.S. at 34 (noting deferral is not required when the state fails to undertake its redistricting duty in a timely fashion)).

However, the record now shows that Plaintiff's arguments are unconvincing and this Court's concern that the North Carolina Supreme Court would fail to act in a timely manner in reviewing *Dickson* is unfounded. Three months after this Court issued their Order denying Defendants' Motion to Stay, Defer, or Abstain, the Plaintiffs who had previously been solely concerned with the North Carolina Supreme Court's alleged lack of urgency in determining the constitutionality of the First and Twelfth Congressional Districts, jointly moved to continue their federal claims. (Doc. 84). Second, the North Carolina Supreme Court subsequently rendered its opinion affirming the ruling of the three-judge panel in *Dickson* and is currently reviewing that ruling on remand. After being instructed to review their decision in *Dickson* in light of the *Alabama* ruling on April 20, 2015, the North Carolina Supreme Court, on May 7, 2015, granted the *Dickson* plaintiffs' Motion for Expedited Schedule on Remand, and scheduled oral arguments. After allowing for an abbreviated period of briefing by the parties, the North Carolina Supreme Court heard arguments on August 31, 2015. There is nothing in the record to suggest that the North Carolina Supreme Court will not issue their opinion on remand in a timely manner.

In moving to continue their claims previously, Plaintiffs cannot now credibly contend that a sense of urgency, or conversely delay in *Dickson*, requires this Court to refuse to abstain or defer further action until that matter is resolved. Instead, the North

Carolina Supreme Court's timely handling of *Dickson* on remand from the United States Supreme Court, coupled with the fact that the state is no longer "hurtling toward a primary election," requires that this Court not "permit federal litigation to be used to impede" state reapportionment. (Doc. 47, p. 2); *See Growe,* 507 U.S. at 34 ("[a]bsent evidence that…state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it"). Therefore, in accordance with the above-cited cases and the record subsequent to this Court's original denial of Defendants' Motion, Defendants' Renewed Motion to Stay, Abstain, or Defer should be granted.

This the 17th day of September, 2015.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Memorandum of Law in Support of Defendants' Renewed Motion to Stay, Defer, or Abstain** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 17th day of September, 2015.

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